

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

YIM, *et al.*,

Plaintiffs,

vs.

CITY OF SEATTLE,

Defendant.

No. 2:18-cv-736-JCC

CITY OF SEATTLE'S MOTION TO  
CERTIFY A QUESTION TO THE  
WASHINGTON SUPREME COURT

NOTE ON MOTION CALENDAR:  
Friday, February 1, 2019

**I. INTRODUCTION AND RELIEF REQUESTED**

The City of Seattle respectfully asks this Court to certify a question to the Washington Supreme Court: What analysis does that court apply to a substantive due process claim arising under the Washington Constitution? This Court should defer to the Washington Supreme Court to resolve that issue. Many of the same plaintiffs in this case, represented by the same counsel, have raised that question in a case the Washington Supreme Court recently agreed to hear on direct review. Certification would provide an efficient means of ensuring the Washington Supreme Court answers that question directly. The City also asks this Court to stay this action pending resolution of the question by the Washington Supreme Court.

## II. RELEVANT FACTS

### A. The *Yim I* Plaintiffs brought a substantive due process claim now before the Washington Supreme Court.

In March 2017, five Seattle landlords (“*Yim I* Plaintiffs”) initiated a facial challenge in King County Superior Court to the City’s First-in-Time (“FIT”) Rule, which essentially requires a landlord to notify prospective tenants of the landlord’s screening criteria and offer tenancy to the first applicant meeting them (“*Yim I*”).<sup>1</sup> Represented by Ethan Blevins and Brian Hodges of the Pacific Legal Foundation, the *Yim I* Plaintiffs allege the FIT Rule facially violates landlords’ substantive due process rights under the Washington Constitution.<sup>2</sup>

In March 2018, the trial court granted the *Yim I* Plaintiffs’ cross motion for summary judgment and denied the City’s.<sup>3</sup> The City filed a notice of appeal to the Washington Supreme Court.<sup>4</sup>

On November 28, 2018, after the parties briefed the appeal, the Washington Supreme Court agreed to consider the City’s appeal on direct review.<sup>5</sup> That Court has not yet set an oral argument date.

### B. Many of the same plaintiffs, represented by the same counsel, raise the same issue before this Court in *Yim II*.

On May 1, 2018, while *Yim I* was pending before the Washington Supreme Court, three of the *Yim I* Plaintiffs and the Rental Housing Association of Washington (“*Yim II* Plaintiffs”)

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<sup>1</sup> City’s *Yim I* Opening at 11 – 12 (Cert. App. 25 – 26). “Cert. App.” refers to the Appendix to this motion, which comprises four *Yim I* Supreme Court documents: (1) City’s Opening Brief (appendices omitted); (2) Yims’ Respondents’ Brief; (3) City’s Reply Brief (appendix omitted); and (4) Order granting direct review.

<sup>2</sup> Yims’ *Yim I* Response at 23 – 41, 48 (Cert. App. 104 – 122, 129).

<sup>3</sup> See City’s *Yim I* Opening at 13 (Cert. App. 27).

<sup>4</sup> See *id.*

<sup>5</sup> *Yim I* Order (Cert. App. 162).

1 initiated this action challenging the City’s Fair Chance Housing Ordinance (“*Yim II*”).<sup>6</sup>  
 2 Represented by Mr. Blevins and Mr. Hodges, the *Yim II* Plaintiffs raise the same claim made in  
 3 *Yim I*: that a City regulation facially violates landlords’ substantive due process rights under the  
 4 Washington Constitution.<sup>7</sup>

5 Today the *Yim II* Plaintiffs and the City concluded their briefing of cross motions for  
 6 summary judgment before this Court.

### 7 III. ARGUMENT

8 Under the Washington Federal Court Local Law Certificate Procedure Act, federal courts  
 9 may certify questions to the Washington Supreme Court when “necessary to ascertain the local  
 10 law of this state in order to dispose of such proceeding and the local law has not been clearly  
 11 determined.”<sup>8</sup> Certification allows federal courts to obtain authoritative answers to unclear  
 12 questions of state law, and is particularly appropriate where the issues are complex and raise  
 13 significant policy implications.<sup>9</sup> Certification “does, of course, in the long run save time, energy  
 14 and resources and helps build a cooperative judicial federalism.”<sup>10</sup> Courts request certification  
 15 “not because a difficult legal issue is presented but because of deference to the state court on  
 16 significant state law matters.”<sup>11</sup>

17 This Court should certify to the Washington Supreme Court the question of the proper  
 18 analysis to apply to substantive due process claims under the Washington Constitution.  
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20 <sup>6</sup> See Complaint, Dkt. # 1-1. See also Notice of Removal, Dkt. # 1.

21 <sup>7</sup> Pls.’ Mot. for Sum. J., Dkt. # 23 at 21 – 24.

22 <sup>8</sup> RCW 2.60.020. *Accord* Wash. RAP 16.16 (the procedure for implementing ch. 2.60 RCW).

23 <sup>9</sup> *Centurion Props. III, LLC v. Chicago Title Ins. Co.*, 793 F.3d 1087, 1089 (9th Cir. 2015).

<sup>10</sup> *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

<sup>11</sup> *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003).

1 That question is unresolved. The parties disagree on the answer: the City maintains  
 2 “rational basis” is the proper analysis, but the *Yim I* and *II* Plaintiffs believe it is “undue  
 3 oppression.”<sup>12</sup> Courts have not provided a clear answer: although the Washington Supreme Court  
 4 has invoked only the “rational basis” analysis since 2006 and several Washington Court of  
 5 Appeals decisions have also invoked “rational basis” since then, other decisions—including one  
 6 from the Ninth Circuit Court of Appeals—have invoked “undue oppression.”<sup>13</sup>

7 The controlling analysis is a significant issue for the balance of power in Washington  
 8 government. Washington will either allow courts wide discretion to second-guess legislative  
 9 choices under the “undue oppression” analysis, or direct courts to accord legislative bodies the  
 10 same deference they enjoy under the federal “rational basis” analysis.

11 The question is complex. As the briefing demonstrates, resolving it requires tracing  
 12 Washington and federal case law back to the 1890s.<sup>14</sup> Although this Court can capably handle  
 13 complexity, the more appropriate course would be to defer to the Washington Supreme Court to  
 14 untangle that authority and interpret the Washington Constitution. Plaintiffs concede the  
 15 Washington Supreme Court is the appropriate body to resolve the question, but mistakenly claim  
 16 the City has waived its chance to seek that review.<sup>15</sup> The case they cite certified a question; it did  
 17 not discuss waiver.<sup>16</sup>

18  
 19 <sup>12</sup> See, e.g., City’s *Yim I* Opening at 15 – 25 (Cert. App. 29 – 39); City’s Opp. & Cross Mot., Dkt. # 33 at 22 – 27; cf.  
 20 Yims’ *Yim I* Response at 23 – 29 (Cert. App. 104 – 110); Pls.’ Mot. for Sum. J., Dkt. # 23 at 17 – 20; Pls.’ Opp. to  
 21 XMSJ & Reply, Dkt. # 48 at 32 – 34.

22 <sup>13</sup> See City’s Opp. & Cross Mot., Dkt. # 33 at 26.

23 <sup>14</sup> See, e.g., City’s *Yim I* Reply at 2 – 8 (Cert. App. 138 – 144); City’s Opp. & Cross Mot., Dkt. # 33 at 23 – 26; Pls.’  
 Opp. to XMSJ & Reply, Dkt. # 48 at 32 – 34.

<sup>15</sup> Pls.’ Opp. to XMSJ & Reply, Dkt. # 48 at 32:19 – 24.

<sup>16</sup> *Moore v. King Cty. Fire Prot. Dist. No. 26*, 545 F.3d 761, 764 (9th Cir. 2008). The Ninth Circuit later withdrew  
 the question after confirming the Washington Supreme Court had issued a decision in another case answering the  
 certified question. *Moore v. King County Fire Prot. Dist. No. 26*, 555 F.3d 1096 (2009).

1 This Court cannot count on *Yim I* to answer the question. The Washington Supreme  
 2 Court could obviate the substantive due process issue there by ruling against the City on one of  
 3 the *Yim I* Plaintiffs' other claims. This Court should certify the due process question to ensure  
 4 the Washington Supreme Court resolves it.

5 Judicial economy and principles of federalism and comity favor certification. This  
 6 situation is analogous to one where the Ninth Circuit Court of Appeals certified an important  
 7 Washington constitutional question upon learning of a pending Washington Supreme Court  
 8 action raising the same issue:

9 Judicial economy favors allowing the state court the option of considering these  
 10 cases together. [T]he question presented is an important one of state constitutional  
 11 law that implicates the balance of power in the Washington state government.  
 Principles of federalism and comity militate in favor of allowing the state to  
 dictate which branch of government has the power to decide its own law.<sup>17</sup>

12 This Court should stay this action pending resolution of the question by the Washington  
 13 Supreme Court. In the interests of efficiency and fairness, this Court may stay an action pending  
 14 resolution of independent proceedings bearing on the action.<sup>18</sup> Sparing this Court from resolving  
 15 the certified question would be efficient, especially when the issue is already pending before the  
 16 Washington Supreme Court. A stay would also be fair for the parties, even if the *Yim II* Plaintiffs  
 17 would prefer a speedier ruling from this Court—where the same attorneys raise the same legal  
 18 issue on behalf of many of the same clients in overlapping cases, they cannot complain when  
 19 courts pause to resolve the issue authoritatively and consistently.

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 22 <sup>17</sup> *Moore*, 545 F.3d at 763.

23 <sup>18</sup> *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 – 64 (9th Cir. 1979). *See, e.g., Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 763 F.3d 1232, 1235 (9th Cir. 2014) (staying proceedings pending resolution of a question certified to the Washington Supreme Court).

IV. CONCLUSION

To defer to the Washington Supreme Court on this significant issue of Washington constitutional law, the City respectfully asks this Court to certify the question of what analysis applies to a substantive due process claim under the Washington Constitution and stay further proceedings in this Court pending resolution of the certified question.

Respectfully submitted, January 11, 2019,

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**CERTIFICATE OF SERVICE**

I certify that on this day I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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DATED January 11, 2019.

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